Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

REPLY COMMENTS OF BT AMERICAS, CBEYOND, EARTHLINK, INTEGRA, LEVEL 3, AND TW TELECOM

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Pursuant to the Commission's *Public Notice* in the above-captioned proceedings,[1] BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom inc. (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these reply comments on the Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-based Special Access Services.[2]

[1] *Wireline Competition Bureau Seeks Comment on Petition to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-based Special Access Services,* Public Notice, 28 FCC Rcd. 1280 (2013) ("*Public Notice*").

[2] *See* Petition of Ad Hoc Telecommunications Users Committee, BT Americas, Cbeyond, Computer & Communications Industry Association, EarthLink, MegaPath, Sprint Nextel, and tw telecom to Reverse Forbearance from Dominant Carrier Regulation of Incumbent LECs' Non-TDM-based Special Access Services, WC Dkt. No. 05-25 & RM-10593 (filed Nov. 2, 2012) ("Petition").

I. INTRODUCTION AND SUMMARY

Although traditional special access services like DS1 and DS3 lines remain vital components of the special access marketplace, the industry is experiencing a gradual and irreversible trend away from such traditional services in favor of non-TDM-based (also known as packet-based) special access services like Ethernet. Virtually every party in this proceeding, including the incumbent LECs, has recognized the increasingly vital role that packet-based services play in the U.S. economy.

Nor is there much doubt that the incumbent LECs' control over last-mile connections to business customers threatens to stifle competition in the provision of Ethernet and other packet-based special access services. As AT&T has candidly acknowledged in its recent Paperwork Reduction Act ("PRA") comments, the key to determining whether incumbent LECs have market power in the provision of special access services—TDM-based or packet-based—is whether a firm possesses substantial and persisting market power over the physical connection to the end user. As explained further herein, the incumbent LECs own the only last-mile connection to the vast majority of business customers in the U.S. It is clear therefore that the Commission must establish an appropriate regulatory regime in this proceeding to ensure that the incumbent LECs do not exploit this control to harm competition in the downstream market for packet-based special access services.

The FCC has repeatedly recognized the need for such rules in this proceeding. It has done so by explicitly seeking comment on the level of regulation that should apply to packet-based special access services in the 2005 *Special Access NPRM*, by repeatedly seeking information regarding the level of competition in the provision of Ethernet and other packet-based services, and by reiterating in the 2012 *Data Request Order and FNPRM* that it intends to

assess the level of competition for all special access services, both TDM-based and packet-based, and to adopt rules that constrain the exercise of market power by price cap incumbent LECs.

In a transparent attempt to undermine the FCC's efforts to adopt such rules, AT&T, Verizon and CenturyLink (as owner of legacy Qwest and legacy Embarq) now argue that the Commission cannot apply rules for packet-based special access services to those companies unless and until the FCC releases yet another NPRM in which it states that it is considering (1) reversing forbearance from dominant carrier regulation and (2) applying new rules governing packet-based special access services to the incumbent LECs that received forbearance (hereinafter, the "Forbearance ILECs"). The Commission must not allow these tactics to delay its critical work in this proceeding. As explained in Part II below, the agency can and should conclude that it has already provided ample notice to interested parties regarding (1) the potential reversal of the *Forbearance Orders* and the deemed grant of forbearance to Verizon and (2) the application of regulations governing packet-based services to the Forbearance ILECs. Even if the Commission were to somehow conclude that it has failed to provide sufficient notice as to these issues, it can and should provide such notice promptly so that it can proceed with saving American businesses from the incumbent LECs' abuse of market power.

The incumbent LECs raise a few procedural arguments in addition to their notice arguments, but those do not pose an obstacle to granting the Petition either. *First*, there is no doubt that the FCC has the authority to reverse the relief granted in the *Forbearance Orders* and the Verizon deemed grant. As discussed in Part II, the Commission clearly has a reasoned explanation for reversing forbearance. Further, the Commission can reverse forbearance without running afoul of the standard of review set forth in *FCC v. Fox Television Stations, Inc.* even if (1) the agency's new policy rested on factual findings that contradict the previous policy or (2)

the existing forbearance policy "engendered serious reliance interests" on the part of the Forbearance ILECs.

Second, the Commission would not need to conduct a rate proceeding under Section 205 of the Act in order to adopt pricing regulations governing special access services. As discussed in Part II, AT&T is well aware of this fact, as it has expressly, and correctly, argued in the past that application of price caps does not constitute a rate prescription subject to Section 205.

The Commission should also reject the incumbent LECs' substantive arguments against granting the Petition. To begin with, nothing precludes the FCC from using a traditional market power analysis to assess competition in "emerging" and "dynamic" markets for broadband services such as packet-based special access services. Such an analysis is consistent with the Commission's broadband deployment mandate in Section 706 of the 1996 Act.

Moreover, while AT&T hyperbolically alleges that the Petitioners have proposed a "jury-rigged," "contrived," and "biased" market power analysis, it is in fact AT&T that advocates an approach to measuring competition that has no basis in economics, law, or policy. As explained in Part III, AT&T asks the FCC to, among other things, (1) abandon the "hypothetical monopolist" test for market definition—a test that is based on "indisputable propositions" of antitrust economics; (2) ignore Commission precedent, common sense, and AT&T's own statements elsewhere in this proceeding by considering non-facilities-based competition in its analysis; (3) disregard the facts and precedent and exclude examination of the wholesale market for packet-based special access services from its analysis; (4) accept AT&T's mischaracterizations of DOJ findings regarding the likelihood of potential entry; and (5) believe AT&T's make-believe claims that it has no cost advantages or first-mover advantages in fiber deployment while it constructs fiber to more than 20,000 commercial buildings in a single year.

Finally, the Commission should reject the incumbent ILECs' complaints that there is insufficient record evidence to reverse forbearance. Ironically, while the incumbent LECs cling to the "findings" of the *Forbearance Orders*, the factual basis for those decisions was far less robust than the basis for establishing appropriate constraints on incumbent LEC abuse of market power over packet-based special access services. In fact, there is a more robust record in this docket than in any other rulemaking proceeding in the last decade. That record evidence clearly demonstrates that incumbent LECs retain control of the bottleneck facilities needed to provide packet-based special access services—control which the Commission has consistently found is *prima facie* evidence of market power. In addition, while the incumbent LECs argue that the Petitioners should provide more current pricing information, much of the relevant pricing data is in the possession of the incumbent LECs themselves (and AT&T is trying to prevent the Commission from collecting such information in the forthcoming mandatory data request). In all events, the information submitted in response to the data request will confirm, consistent with AT&T's PRA comments, that the incumbent LECs' control over the physical connections needed to serve business customers gives them market power in the provision of packet-based special access services. As explained in Part III, none of the evidence of purported competition relied upon by the Forbearance ILECs alters this fundamental reality.

II. THE COMMISSION HAS THE AUTHORITY TO REVERSE FORBEARANCE AND ADOPT REGULATIONS GOVERNING PACKET-BASED SPECIAL ACCESS SERVICES APPLICABLE TO ALL PRICE CAP INCUMBENT LECS.

A. The Commission Has The Authority To Reverse Forbearance From Dominant Carrier Regulation Of Packet-Based Special Access Services.

Bedrock principles of administrative law mandate that an expert agency has the authority to change its regulatory regime in light of the circumstances.[3] This means that the FCC has the

[3] *See* Petition n.63.

authority to grant and reverse forbearance as it sees fit, subject of course to review by appellate courts. CenturyLink, however, disputes this fact and argues that the Commission can never reverse a grant of forbearance.[4] None of CenturyLink's arguments have merit.

First, CenturyLink asserts that, once forbearance is granted, the relevant statutory provision is effectively "remove[d] . . . from the United States Code" and can only be reapplied through new legislation by Congress.[5] CenturyLink offers no support for this claim.[6] Although it relies upon *Sprint Nextel Corp. v. FCC*, that case merely stands for the proposition that "Congress, not the Commission, 'granted' Verizon's forbearance petition."[7] The court did not address forbearance granted by FCC order, so it offers no help to companies like CenturyLink that received forbearance pursuant to the *Forbearance Orders*.[8] In any event, *Sprint Nextel* did

[4] *See* CenturyLink Comments at 11-14; *see also* ITTA Comments at 2 (arguing that the "Commission lacks authority" to reverse forbearance). Unless otherwise indicated, all references to "Comments" are to those filed in WC Dkt. No. 05-25 on April 16, 2013.

[5] CenturyLink Comments at 11.

[6] Nor could it. As discussed in Part II.B.1 below, there is no question that, once forbearance is granted, the relevant statutory provisions and/or FCC rules remain on the books and apply to those entities and in those contexts that are beyond the scope of the forbearance grant.

[7] *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

[8] *See generally Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 18705 (2007) ("*AT&T Forbearance Order*"); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 19478 (2007) ("*Embarq/Frontier Forbearance Order*"); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260 (2008) ("*Qwest Forbearance Order*") (collectively, the "*Forbearance Orders*").

not, as CenturyLink implies,[9] hold that only Congress can re-impose the regulations from which a petitioner obtains forbearance through a deemed grant. The case simply does not address that issue.[10]

CenturyLink also relies on a 28-year old case that preceded the adoption of Section 10, *MCI Telecomms. Corp. v. FCC*, to argue that any "post-forbearance re-imposition of statutory requirements . . . 'must come from Congress.'"[11] That case says no such thing. The *MCI* court merely held that authority to grant forbearance in the first instance from the statutory provisions at issue must come from Congress.[12] The case says nothing about whether, once granted the power to forbear under the statute (as occurred when Congress enacted Section 10 of the Communications Act),[13] the agency may reverse course.

Nor does the legislative history of Section 10 cited by CenturyLink[14] reveal anything other than Congress' desire to give the Commission a tool to deregulate when doing so is in the

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[9] *See* CenturyLink Comments n.28.

[10] For this reason, nothing in *Sprint Nextel* precludes the FCC from reversing the Verizon deemed grant. Moreover, the Commission explicitly stated in 2007 that it would "issue an order addressing" the deemed grant of forbearance to Verizon from Title II economic and public policy regulation and the FCC's *Computer Inquiry* requirements "to ensure regulatory parity" with AT&T, which was denied such forbearance for its packet-based special access services. *See AT&T Forbearance Order* ¶ 50. There is no reason that the Commission could not also issue an order addressing the deemed grant of forbearance from dominant carrier regulation of Verizon's packet-based special access services.

[11] CenturyLink Comments at 12.

[12] *See MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1195 (D.C. Cir. 1985).

[13] 47 U.S.C. § 160. The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq*. ("Communications Act" or "Act"), was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[14] *See* CenturyLink Comments at 12-13 & nn.33-34.

public interest. The legislative history therefore leaves in place the basic presumption that an agency can change its mind, including by reversing forbearance.

Second, CenturyLink asserts that reversing forbearance "would call into question all prior forbearance relief."[15] Taken to its logical extreme, CenturyLink's argument is that the FCC can never change course because doing so would cast doubt on every decision the agency has ever made. That is absurd. Even AT&T concedes that "no Commission action is ever 'chiseled in marble'" and that "the Commission *can* revisit its forbearance decision."[16] Nor does Verizon dispute that the Commission has the authority "to reverse a forbearance grant."[17]

Third, CenturyLink (as well as AT&T) suggests that the Commission cannot reverse forbearance because the D.C. Circuit upheld the *AT&T* and *Embarq/Frontier Forbearance Orders*.[18] But the fact that the D.C. Circuit affirmed—using a "particularly deferential"

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[15] *Id.* at 35.

[16] AT&T Comments at 9 (emphasis in original) (internal citation omitted). AT&T nevertheless relies on statements from a former General Counsel of the FCC to suggest that the agency should not reverse forbearance because it has never been done before or because the task would be too difficult. *See id.* n.23; *see also* CenturyLink Comments n.99. But the incumbent LECs' reliance on Austin Schlick's statements—made in the context of advocating a so-called "third way" approach to regulating broadband Internet access service—is misplaced. As Mr. Schlick explained, "[u]nforbearing" in the context of broadband Internet access service would be difficult largely because the Commission would be imposing many Title II regulations that had never before been applied to that service. *See* Austin Schlick, General Counsel, FCC, "A Third-Way Legal Framework for Addressing the *Comcast* Dilemma," at 9 (rel. May 6, 2010). That would not be the case if forbearance from regulation of incumbent LECs' packet-based special access services were reversed. In all events, Mr. Schlick expressly acknowledged that "neither [granting forbearance nor maintaining an information service classification] would, could, or should absolutely prevent the Commission from adjusting its future policies in light of changed circumstances." *Id.* at 8.

[17] Verizon Comments at 19.

[18] *See* CenturyLink Comments at 9; AT&T Comments at 33-34 ("Petitioners fail to mention that most of their arguments were previously made and rejected by the D.C. Circuit.").

standard[19]—the FCC's policy judgments in those *Orders* does not preclude the agency from reversing forbearance. As CenturyLink itself recognizes,[20] the FCC generally has the discretion to change its policies as long as it (1) displays awareness that it is changing its position, (2) ensures that the new policy is permissible under the statute, and (3) shows that there are good reasons for the new policy.[21]

CenturyLink, however, argues that under *FCC v. Fox Television Stations, Inc.*, the Commission is required to provide "a more detailed justification" for reversing forbearance because (1) the FCC's "new policy [would] rest[] upon factual findings that contradict those which underlay its prior policy" and (2) the existing policy "has engendered serious reliance interests that must be taken into account."[22] Even if that were the case, the Commission could readily meet this heightened standard.

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[19] *See Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 908 (D.C. Cir. 2009).

[20] *See* CenturyLink Comments at 16-18.

[21] *See FCC v. Fox Televisions Stations, Inc.*, 556 U.S. 502, 515 (2009). For example, the Commission could explain that it is necessary to reverse forbearance because, based on the record evidence, the FCC's predictions of future competition underlying the *Forbearance Orders* (*see, e.g., AT&T Forbearance Order* ¶¶ 47-49) have proven erroneous. *See, e.g.*, Petition at 41-51 (discussing the level of actual and potential competition in the provision of packet-based special access services); Level 3 Comments at 3 ("Th[e] assumptions [underlying the *Forbearance Orders*] have not been borne out by the experience of Level 3, which is both a buyer and a seller in this marketplace. For all too many locations and routes, there simply is no alternative to the ILEC for high speed special access services, regardless of the technology deployed."). As the Commission has acknowledged, where its predictive judgments have not materialized, the agency must—consistent with its duty to practice reasoned decisionmaking—reconsider the decisions made on the basis of those judgments. *See Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd. 10557, n.14 (2012) ("*Pricing Flexibility Suspension Order*").

[22] *See id.* at 515.

The Commission could begin by explaining that it is departing from the approach used in the *Forbearance Orders* because that approach is inherently less reliable than a market power analysis. Indeed, in the *Forbearance Orders* the FCC acknowledged that its "analysis of forbearance from dominant carrier regulation is informed by its traditional market power analysis,"[23] but it departed from the traditional market power analysis in a number of important respects. As set forth in the Petition, the Commission (1) failed to define the relevant product and geographic markets; (2) relied on the presence of competition from non-facilities-based providers even though such competitors do not constrain incumbent LEC abuse of market power over last-mile facilities; (3) found, without any record evidence, that potential entry was likely; and (4) failed to examine other "clearly identifiable market features," such as the level of demand elasticity and cost structure, size, and resources of the incumbent LECs.[24] As further discussed in the Petition, instead of relying on the longstanding elements of the traditional market power framework, the Commission considered factors that have no relevance to the level of competition for packet-based special access services.[25]

Unlike the approach used in the *Forbearance Orders*, the traditional market power framework—which is based on "well-accepted" principles of economics that have been developed in antitrust law to assess the competitiveness of the relevant markets[26]—is a reliable framework for evaluating whether forbearance from dominant carrier regulation is justified

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[23] *See, e.g., AT&T Forbearance Order* n.80.

[24] *See* Petition at 15-16; *see also* Level 3 Comments at 1-3.

[25] *See* Petition at 16-17.

[26] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd. 3271, ¶ 38 (1995); *see also* Brief for Respondents, *Qwest Corp. v. FCC*, No. 10-9543, at 19 (10th Cir. filed Jan. 10, 2011).

under Section 10. As the Commission has already held, a "market analysis"[27] based on the *DOJ-FTC Horizontal Merger Guidelines*[28] (an analysis also known as the traditional market power framework) "ensure[s] that appropriate regulatory relief is granted in those markets where competitive conditions justify it."[29] It does so by using "economically sound standards for defining product [and geographic] markets,"[30] "identif[ying] significant current and potential market participants,"[31] "consider[ing] their impact when assessing the level of competition in a market,"[32] and "allow[ing] for specific, economically rigorous, and factually specific inquiries regarding potential competition."[33] In addition, that framework "was designed to identify when competition is sufficient to constrain carriers from imposing unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions"—which is "the precise inquiry specified in section 10(a)(1)."[34] Thus, it would not be "arbitrary and capricious" for the FCC to (1) conduct a traditional market power analysis here, (2) make factual findings based on that analysis that are different from those made in the *Forbearance Orders*, and (3) reverse

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[27] *Pricing Flexibility Suspension Order* ¶ 87.

[28] *See generally* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (Aug. 19, 2010) ("*DOJ-FTC Horizontal Merger Guidelines*" or "*Merger Guidelines*").

[29] *Pricing Flexibility Suspension Order* ¶ 95.

[30] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, n.169 (2010) ("*Phoenix Order*")

[31] *Pricing Flexibility Suspension Order* ¶ 91.

[32] *Id.*

[33] *Id.* ¶ 100.

[34] *Phoenix Order* ¶ 37; *see also Pricing Flexibility Suspension Order* ¶ 87.

forbearance accordingly.[35] The massive amount of detailed information that the Commission will receive in response to the forthcoming special access data request will also enable the agency to adopt a new policy (*i.e.*, reverse forbearance and establish regulations governing packet-based special access services) that "rests upon factual findings that contradict those which underlay its prior policy"[36] without running afoul of the arbitrary-and-capricious standard.

CenturyLink is also incorrect that the Commission cannot comply with the requirement that it provide "further justification" for reversing forbearance if the forbearance grants have "engendered serious reliance interests,"[37] as CenturyLink claims.[38] To begin with, such reliance was unjustified under the circumstances. CenturyLink and the other Forbearance ILECs have been on notice for years that the Commission is considering reversing those forbearance decisions. As the FCC explicitly stated in each of the *Forbearance Orders*, "the Commission

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[35] The Commission could further justify reversing its prior conclusion that the availability of TDM-based special access inputs supports forbearance from regulation of packet-based special access services. Specifically, in the *Forbearance Orders*, the Commission held that granting forbearance would not harm competitors seeking to provide Ethernet and other packet-based special access services to business customers in part because competitors would still have access to TDM-based DS1 and DS3 special access inputs subject to price regulation (except, of course, in "Phase II" pricing flexibility areas). *See, e.g., AT&T Forbearance Order* ¶ 25. The Commission's Technological Advisory Council, however, has since recommended that the FCC enable incumbent LECs to cease offering DSn services in 2018 (and AT&T has vigorously advocated that it should have this right as of January 1, 2017). *See* FCC Technological Advisory Council, Status of Recommendations, at 11 (June 29, 2011), *available at* http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf; Comments of AT&T, WC Dkt. Nos. 10-90 *et al.*, at 6 (filed Apr. 18, 2011). If the Commission were to adopt this recommendation, TDM-based special access inputs would no longer be available and could no longer be used as a justification for forbearance. In all events, it is increasingly clear that DSn-based services are not adequate substitutes as wholesale inputs for Ethernet services. *See* Part IV.C.3 *infra*.

[36] *See Fox Television Stations*, 556 U.S. at 515.

[37] *Id*.

[38] *See* CenturyLink Comments at 31-35.

has the option of revisiting this forbearance ruling should circumstances warrant."[39] Likewise, the D.C. Circuit expressly stated that the Commission could "reassess" its decisions in the *AT&T* and *Embarq/Frontier Forbearance Orders*,[40] and the same is undoubtedly true of the *Qwest Forbearance Order*. Also, as discussed in Part II.B below, all of the Forbearance ILECs—including Verizon, which obtained such relief by operation of law—have been on notice for years that the FCC is considering applying pricing regulations to incumbent LECs' packet-based special access services. This is evidenced by the fact that Verizon, for example, has repeatedly argued against the adoption of such regulations in its filings in the special access rulemaking proceeding.[41]

Moreover, even if CenturyLink and the other Forbearance ILECs could have justifiably relied on forbearance from dominant carrier regulation to enter into numerous "individualized" and "'tailored'" commercial agreements with enterprise and carrier customers,[42] they could not

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[39] *See, e.g.*, *Qwest Forbearance Order* n.127.

[40] *See Ad Hoc Telecomms. Users Comm.*, 572 F.3d at 911.

[41] *See, e.g.*, Letter from Dee May, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 05-25 *et al.*, at 3 (filed Oct. 11, 2007) (arguing that packet-based services "warrant a lighter regulatory touch"); Reply Comments of Verizon and Verizon Wireless, WC Dkt. No. 05-25, at 60 (filed Feb. 24, 2010) (arguing that there is "no basis for the Commission to impose any regulatory restrictions on [Ethernet and OCn] services").

[42] *See* CenturyLink Comments at 31-33 (internal citation omitted); *see also* Verizon Comments at 6-7. CenturyLink asserts that reasonable reliance on forbearance by not only the Forbearance ILECs but also their enterprise customers prevents the FCC from reversing forbearance and granting the instant Petition. *See* CenturyLink Comments at 31-32. More specifically, CenturyLink claims that reversing forbearance would harm enterprise customers by "upset[ting] [their] expectations regarding their ability to obtain individualized solutions from ILECs, as well as their competitors." *Id.* at 32. But CenturyLink's reliance argument is belied by the fact that enterprise purchasers of incumbent LEC packet-based special access services are among the many parties calling for the FCC to reverse forbearance. *See* Comments of Ad Hoc Telecommunications Users Committee, WC Dkt. No. 05-25, at ii & 3 (filed Feb. 11, 2013) (arguing, on behalf of its enterprise customer members, that the Commission must reform its special access policies, including the "unjustifiable deregulation of Ethernet services," because

have reasonably relied on that relief to enter into commercial agreements that violate Sections 201 and 202 of the Act.[43] The relief granted in the *Forbearance Orders* was expressly conditioned on compliance with those core statutory provisions,[44] and the D.C. Circuit affirmed the *AT&T* and *Embarq/Frontier Forbearance Orders* in part because "AT&T, Embarq, and Frontier 'continue to be subject to [S]ections 201 and 202 of the Act.'"[45] Verizon has also been on notice since 2007 that it should not enter into commercial agreements for packet-based special access services that violate Sections 201 and 202.[46] Nevertheless, the available evidence demonstrates—and the detailed information submitted in response to the forthcoming special access data request will confirm—that incumbent LECs offer their packet-based special access services on rates, terms, and conditions that are unjust, unreasonable and/or unjustly or unreasonably discriminatory in contravention of Sections 201(b) and 202(a).[47] Therefore, the

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those policies have resulted in "disastrous consequences for end users."). Nor should HawTel's claims of purported harm to enterprise customers preclude the FCC from reversing forbearance. According to HawTel, "[i]t would be markedly anti-consumer" to reverse forbearance, "particularly when the market is competitive." HawTel Comments at 4. HawTel, however, misses the entire point of the Petition, which seeks the reversal of forbearance and the adoption of regulations in the product and geographic markets where there is insufficient competition to constrain the incumbent LEC's market power in the provision of packet-based special access services. Where competition *is* sufficient, the regulations the Commission adopts will not apply and therefore, there will be no harm to enterprise customers, as HawTel alleges.

[43] 47 U.S.C. §§ 201, 202.

[44] *See, e.g., AT&T Forbearance Order* ¶ 35.

[45] *See Ad Hoc Telecomms. Users Comm.*, 573 F.3d at 909.

[46] As noted above, in the 2007 *AT&T Forbearance Order*, the FCC expressly stated that it would adopt an order addressing the deemed grant of forbearance to Verizon from Title II of the Act—including Sections 201 and 202—to ensure regulatory parity with AT&T, which did not receive such forbearance for its packet-based special access services. *See supra* note 10.

[47] *See, e.g.*, Petition at 57-58. As explained in Part IV.B below, much of the information needed to demonstrate that incumbent LEC's prices for packet-based special access services are unreasonable lies in the hands of the incumbent LECs themselves.

FCC can and should reverse forbearance from dominant carrier regulation notwithstanding the purported reliance interests of the Forbearance LECs.

B. Neither A New Rulemaking Nor A Supplemental Notice Is Required To Reverse Forbearance And Apply New Regulations Governing Packet-Based Special Access Services To The Forbearance ILECs.

As explained in the Petition, the Commission should both reverse forbearance from dominant carrier regulation and apply new regulations to the Forbearance ILECs designed to prevent them from abusing their market power in the provision of packet-based special access services. The Forbearance ILECs' arguments that they have not been provided sufficient notice under the Administrative Procedure Act ("APA")[48] that the Commission is considering these two steps have no merit.

1. The FCC Need Not Follow The APA Notice Requirements For Rulemakings In Order To Reverse Forbearance

The Commission's consideration of whether to reverse forbearance from dominant carrier regulation of packet-based special access services is an adjudicative proceeding under the APA that is not subject to the more demanding notice requirements of a rulemaking.[49] The *Public Notice* provides the Forbearance ILECs more than sufficient notice and, accordingly, the Commission need not issue any form of supplemental notice prior to reversing forbearance. The Forbearance ILECs' assertions that the agency's consideration of reversal must be treated as a rulemaking are therefore without merit.[50]

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[48] 5 U.S.C. §§ 551 *et seq.*

[49] That the Petition was filed in the instant rulemaking proceeding has no bearing on the analysis. It is well-established that the Commission has authority to "bifurcate a proceeding it began as a rulemaking and resolve some of the issues raised in the proceeding through issuance of a declaratory order in an adjudication." Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 6.1 (5th ed. 2010) (citing *Qwest Servs. Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007)).

[50] *See* AT&T Comments at 9-20; Verizon Comments at 18-20.

Section 10 of the Act states that the Commission shall "forbear from *applying*" any regulation or statutory provision for which the criteria set forth in Section 10 are met.[51] The Commission's decision to forbear from applying certain rules pursuant to Section 10 does not result in any change in the rules themselves.[52] Even after the Commission granted forbearance, the dominant carrier laws and rules have remained unchanged in the U.S. Code and the Code of Federal Regulations, and they continue to apply in those contexts not encompassed by the grants of forbearance.[53] Accordingly, the requirements that are the subject of the forbearance continue to apply to those entities that did not receive forbearance (*e.g.*, the price cap incumbent LECs owned by legacy CenturyTel, Cincinnati Bell, and Windstream, among others). The case-by-case review of whether to "apply" a rule in a particular circumstance and to a particular party bears little resemblance to a proceeding utilizing the Commission's quasi-legislative rulemaking authority, which has much broader applicability and generally results in a rule that "redefin[es] the nature of a substantive right."[54]

The Commission has generally followed adjudication procedures in forbearance proceedings.[55] It did so when it originally considered whether to grant forbearance from

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[51] *See* 47 U.S.C. § 160(a) (emphasis added).

[52] *See, e.g.*, *Fones4All Corp. v. FCC*, 550 F.3d 811, 815 (9th Cir. 2008) ("Petitions for forbearance ask the FCC, as the name suggests, to forbear from *applying* a certain regulation *to the entity* [that filed the petition].") (emphasis added).

[53] *See generally* 47 U.S.C. §§ 203, 214; 47 C.F.R. §§ 61.31-59; 47 C.F.R. § 63.71; 47 C.F.R. Part 69.

[54] Richard J. Pierce, Jr., *supra* note 49, § 6.6.

[55] *See, e.g.*, *Petition for Forbearance from E911 Accuracy Standards Imposed on Tier III Carriers for Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd. 24648, ¶ 12 (2003) ("Therefore, as a general matter, we find, based on the guidance of the court in *CTIA*, that a petition for forbearance is resolved under the usual standards for agency adjudication.).

dominant carrier regulation of packet-based special access services. Notably, AT&T has itself asserted that "forbearance proceedings are *adjudications*, not rulemakings."[56]

Reversing forbearance from dominant carrier regulation of packet-based special access services would similarly qualify as an adjudication. As with a grant of forbearance, the reversal proceeding consists of a case-by-case determination of whether to apply an existing rule to each particular entity that received forbearance while the rule continues to apply in all other contexts. Similarly, the Commission has treated reversals of previously-granted waivers as adjudicative, case-by-case proceedings rather than rulemakings.[57]

Administrative adjudications are subject to significantly less rigorous notice requirements than rulemakings. To provide adequate notice in an adjudication, "it is only necessary that the one proceeded against be reasonably apprised of the issues in controversy, and any such notice is adequate in the absence of a showing that a party was misled."[58] The Forbearance ILECs have been reasonably apprised of the issues in controversy. The Petition and subsequent *Public Notice* clearly set forth the issue of whether the *Forbearance Orders* and the Verizon deemed

[56] Comments of AT&T, Inc., WC Dkt. No. 07-267, at 18 (filed Mar. 7, 2008) (emphasis in original) ("In all events, forbearance proceedings are *adjudications*, not rulemakings, and thus are not governed by Section 553 of the APA. Accordingly, notice and comment procedures of Section 553 are certainly not required here. In adjudications, the APA and the Communications Act provide the Commission with appropriate and very broad authority to customize its notice and comment procedures to address the particular circumstances and issues raised in each case, and there is no need for the Commission to abandon that approach.").

[57] *See, e.g.*, *Anglers for Christ Ministries, Inc. et al.*, Memorandum Opinion & Order, Order, & Notice of Proposed Rulemaking, 26 FCC Rcd. 14941, ¶ 3 (2011) (applying adjudication procedures to consideration of waiver reversal).

[58] *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1954) (rejecting a notice challenge in an adjudication where the Department of Agriculture had set out the specific issues to be considered in an order of inquiry).

grant should be reversed.[59] Moreover, the Forbearance ILECs' own comments fully address the merits of this issue.[60] Having received multiple clear descriptions of the issue and provided extensive comment on it, there is no possibility that the Forbearance ILECs will be misled if the Commission ultimately decides to reverse the forbearance decisions.

Finally, the Commission's delegation of authority to the Wireline Competition Bureau ("Bureau") in Section 0.91(m) of the Commission's Rules to "carry out the functions of the Commission" empowers the Bureau to provide notice of an adjudication.[61] Accordingly, the Bureau's release of the *Public Notice* in this context constitutes agency action and meets the notice requirements of the APA.

2. The Forbearance ILECs Have Received Adequate Notice That They Will Be Subject To New Rules Governing Packet-Based Special Access Services That The Commission Adopts In This Proceeding

In addition to reversing the grants of forbearance affecting the specific incumbent LECs that are the subjects of those decisions, the Commission must adopt new rules designed to constrain the market power of *all* incumbent LECs in the provision of packet-based special access services. There is no dispute that the Commission has provided sufficient notice to *adopt* such new rules: the *2005 NPRM*[62] and subsequent notices in this proceeding clearly meet the

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[59] *See, e.g.*, Petition at 3-9 (urging the Commission to conduct a market power analysis of incumbent LEC non-TDM-based special access service offerings and reverse the grants of forbearance to the named incumbent LECs); *Public Notice* at 1 (seeking comment on the "petition to reverse forbearance from dominant carrier regulation and certain *Computer Inquiry* requirements granted to Verizon, AT&T, legacy Embarq, Frontier, and legacy Qwest in their provision of non-TDM-based special access services.").

[60] *See* AT&T Comments at 21-48; Verizon Comments at 4-17; CenturyLink Comments at 18-51.

[61] 47 C.F.R. § 0.91(m).

[62] *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, ¶ 52

APA's notice-and-comment requirements for this purpose. The only dispute arises from the Forbearance ILECs' assertion that the Commission must provide additional notice in order to *apply* such new rules to the Forbearance ILECs.[63] For example, AT&T argues that such supplemental notice is required because granting forbearance from dominant carrier regulation somehow narrowed the scope of the notice provided in the *2005 NPRM* to exclude application of new rules governing packet-based special access to the Forbearance ILECs.[64] Regardless of whether this is so, no supplemental notice is required prior to applying new packet-based special access rules to the Forbearance ILECs.

First, the FCC has satisfied the notice requirements of the APA because the Forbearance ILECs have received actual notice that the Commission is considering adopting new rules designed to constrain the Forbearance ILECs' market power in the provision of packet-based special access services. The APA excuses the usual notice requirements for rulemakings where interested parties "are named and either personally served or otherwise have actual notice" of the agency's consideration of new rules, so long as the notice includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[65] The actual notice afforded to the Forbearance ILECs pursuant to the *Public Notice* and the Petition satisfies these requirements for purposes of applying new packet-based special access rules to those carriers. The *Public Notice* lists each Forbearance ILEC by name, explains that the Petition seeks reregulation of packet-based special access services offered by those incumbent LECs, and seeks

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(2005) ("*2005 NPRM*") (seeking comment on "the proper regulatory treatment" of "packet-switched services").

[63] *See* AT&T Comments at 9-20; Verizon Comments at 18-20; *see also* ITTA Comments at 3.

[64] *See* AT&T Comments at 11 & n.28.

[65] 5 U.S.C. § 553(b).

comment on the proposals set forth in the Petition.[66] The Petition, in turn, explicitly seeks application of new Commission rules governing packet-based special access services to the Forbearance ILECs, and, in so doing, the Petition names each Forbearance ILEC.[67] In addition, the initial comments submitted by the Forbearance ILECs reflect a full awareness that their packet-based special access services may become subject to new regulations adopted in this proceeding.[68]

AT&T's argument that the D.C. Circuit's opinion in *Sprint Corp. v. FCC* requires that the Commission issue a supplemental notice is without merit.[69] In *Sprint*, the D.C. Circuit held that the FCC failed to provide adequate notice that it was considering adopting a new payphone compensation rule where the agency notice consisted of a public notice seeking comment on a petition proposing new payphone compensation rules. Importantly, however, the court indicated that Sprint would not have had a basis for challenging the Commission's new payphone compensation rule if Sprint had received actual notice that the Commission was considering such a rule.[70] The court held that Sprint lacked actual notice because (1) the rule adopted by the Commission went beyond the scope of what was proposed in the relevant petition and, therefore, what was discussed in the public notice; and (2) the comments filed in response to the public

[66] *See Public Notice* at 1.

[67] *See* Petition at 57-60.

[68] *See* AT&T Comments at 21-48; Verizon Comments at 17-29.

[69] *See* AT&T Comments at 18 & n.48.

[70] *See Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003).

notice "demonstrate[d] that the parties did not appreciate that the Commission was contemplating" the rule adopted by the Commission.[71]

Neither factor is present here. There is no possibility that the scope of new rules for packet-based special access services will exceed the broad scope of those advocated in the Petition.[72] In addition, the comments filed in response to the Petition clearly show that interested parties, including the Forbearance ILECs, understand that the Commission has been asked to apply new regulations designed to constrain the exercise of their market power in the provision of packet-based special access services.[73] The Forbearance ILECs should therefore be deemed to have received actual notice that the Commission is considering applying new rules governing packet-based special access services to the Forbearance ILECs.

Second, the FCC has satisfied the notice requirements of the APA because application of new rules for packet-based special access services to the Forbearance ILECs is a "logical outgrowth" of the notice provided in the *Data Request Order and FNPRM*.[74] Specifically, the Commission proposed in the *FNPRM* to adopt rules that will apply to any provider of any special access service that is shown to exercise market power. Accordingly, the Forbearance ILECs are subject to unambiguous notice that the Commission will apply new rules for packet-based

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[71] *Id.*

[72] The Petition asks the Commission to adopt any and all new rules, including new pricing rules, necessary to constrain incumbent LEC exercise of market power in the provision of any special access service in any relevant market. *See* Petition at 59.

[73] *See, e.g.*, AT&T Comments at 21-48; Verizon Comments at 17-29.

[74] *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 (2012). In these reply comments, the Report and Order is referred to as the "*Data Request Order*." The Further Notice of Proposed Rulemaking is referred to as the "*Further NPRM*" or "*FNPRM*."

special access services to the Forbearance ILECs where the agency deems it necessary to ensure just and reasonable rates, terms and conditions for such services.

Under the logical outgrowth standard, an agency final rule may differ substantially from the description of the agency's proposed course of action in an NPRM as long as the final rule can be fairly considered a "logical outgrowth" of the proposals described in the NPRM.[75] The D.C. Circuit has held that notice is adequate under this standard where a reasonable commenter "should have anticipated" that the agency would adopt a rule.[76] The Commission need not provide notice of specific proposed rules so long as the notice makes clear that the agency was conducting a "general investigation" into the subject matter that encompasses the rules ultimately adopted.[77]

In the *Data Request Order and FNPRM*, the Commission defined the term "special access" to "encompass all services that do not use local switches," including packet-based services offered by Forbearance ILECs.[78] The Commission then authorized the Bureau to issue a mandatory request for data regarding, among other things, the location, prices, terms and conditions on which incumbent LECs, including the Forbearance ILECs, offer packet-based special access services.[79] Indeed, the draft data request released as an appendix to the *Data*

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[75] *See, e.g.*, *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) (notice is adequate if "sufficient to advise interested parties that comments" regarding the relevant provision should have been made).

[76] *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549.

[77] *Wilson & Co. v. United States*, 335 F.2d 788, 795 (7th Cir. 1964) (rejecting notice challenge of rule altering specific private line tariff schedules where FCC had expressed its intention to conduct a general investigation of private line tariffing).

[78] *Data Request Order* n.1.

[79] *See id.* ¶¶ 30-46 & 52.

Request Order and FNPRM clearly encompasses packet-based special access services offered by the Forbearance ILECs.[80] The Commission explained that it intends to use the information obtained in response to the data request "to conduct a comprehensive evaluation of competition in the special access market."[81] The Forbearance ILECs have therefore been provided clear notice that the Commission's "comprehensive evaluation of competition in the special access market" will encompass their packet-based special access service offerings.

Furthermore, in the *FNPRM*, the Commission explained that the results of its comprehensive evaluation of competition will enable the Commission "to obtain a more accurate picture of competition for special access" than it currently has, and it will enable the Commission to determine "what regulatory changes, if any, are warranted in light of that analysis."[82] Given that "special access" encompasses the Forbearance ILECs' packet-based special access services and that the Commission's analysis will encompass such services, the "regulatory changes" the Commission is expressly considering include the application of any new rules to packet-based special access services offered by Forbearance ILECs. Paragraph 67 of the *FNPRM* removes any ambiguity on this point:

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[80] The *Data Request Order* requires the submission of information regarding "Dedicated Services," a term that is defined to "include, but is not limited to," packet-based dedicated services that were the subject of forbearance granted to the Forbearance ILECs. *Id.*, Appendix A at 16,360. The *Data Request Order* further requires that "Incumbent Local Exchange Carriers" provide information regarding the rates, terms, conditions and locations of the packet-based Dedicated Services that they offer. *Id.* at 16,361. The *Data Request Order* defines "Incumbent Local Exchange Carrier" as "a LEC that provides a Dedicated Service in study areas where it is subject to price cap regulation under sections 61.41-61.49 of the Commission's rules." *Id.* The Forbearance ILECs do not, and cannot, dispute that they qualify as Incumbent Local Exchange Carriers under this definition and that the packet-based special access services they offer in their incumbent LEC territories are encompassed by the *Data Request Order*.

[81] *Id.* ¶ 13.

[82] *Id.* ¶ 66.

> The one-time, multi-faceted market analysis will help the Commission determine whether *any market participants* have market power and, if so, where such market power exists. This will better allow us to determine the sources of such market power, the likely extent to which it is sustainable over time, and *how to construct (where required) targeted regulatory remedies*."[83]

Again, the phrase "any market participants" must be read to include the Forbearance ILECs in their capacity as providers of packet-based special access services, because those firms provide such services and the phrase is not qualified to exclude the Forbearance ILECs. The phrase "targeted regulatory remedies" must be read to encompass any rules designed to constrain the exercise of market power by "any market participants," including rules governing the rates, terms and conditions on which packet-based special access services are offered.

In addition, the Commission's discussion of possible changes to its pricing flexibility rules provides notice that the Commission is considering adopting new pricing flexibility rules that will apply to any and all price cap incumbent LEC providers of packet-based special access services, including any Forbearance ILEC. In discussing the adoption of new pricing flexibility rules in the *FNPRM*, the Commission repeatedly refers to such rules as applying to any and all "special access services."[84] Nowhere does the Commission state or imply that the new pricing flexibility rules would only apply to DS1 and DS3 services or that the rules would not apply to the Forbearance ILECs. This of course makes sense. The Commission expressly stated that it

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[83] *Id.* ¶ 67 (emphasis added).

[84] *See, e.g., id.* ¶ 80 ("Once the data are collected and analyzed, we may modify the existing pricing flexibility rules or adopt a new set of rules that will apply to request for special access pricing flexibility."); *id.* ("[W]e seek comment on how the special access pricing flexibility rules might change after we conclude the market analysis proposed above."); *id.* ¶ 81 ("[W]e seek comment on the viability of proxies as a means of measuring special access competition going forward."); *id.* ¶ 83 ("[W]e seek comment on what appropriate proxies for special access competition are. . . . Could business establishment density be an appropriate proxy for special access competition?"); *id.* ¶¶ 87, 90 (discussing the need to utilize an appropriate geographic area for consideration of "special access" competition today).

seeks to adopt rules designed to limit the harmful effects of market power held by "any market participants."[85] Thus, the new regime would, as the Commission explained, include "targeted regulatory remedies" to address any price cap incumbent LEC's market power in the provision of packet-based special access services, and any future pricing flexibility rules would enable any price cap incumbent LEC to seek the reduction or elimination of those rules where appropriate.[86]

In light of the unambiguous language of the *Data Request Order and FNPRM*, there can be no question that the Forbearance ILECs "should have anticipated"[87] that new rules governing incumbent LEC packet-based special access services will apply to the Forbearance ILECs. There is simply no question that the "general investigation"[88] of the optimal means of identifying and constraining incumbent LEC market power in the provision of packet-based special access services described in the *Data Request Order and FNPRM* encompasses the Forbearance ILECs' packet-based special access services. This is especially clear given the size and importance of AT&T, Verizon, legacy Qwest, legacy Embarq, and Frontier in the special access marketplace. These incumbent LECs provide the vast majority of the special access circuits sold today in the United States. It is implausible to interpret the Commission's stated, and unqualified, intention to apply new "targeted regulatory remedies" to "any market participants" that have market power

[85] *Id.* ¶ 67.

[86] AT&T's own advocacy shows that it understands that the Commission is considering applying new rules for packet-based special access services to the Forbearance ILECs because AT&T has sought to influence the content of those rules. For example, in the *FNPRM*, the Commission discusses AT&T's argument that "rather than perform a more granular analysis of individual petitions for pricing flexibility, the Commission [should] extend blanket Phase I relief to all special access services, *fully de-regulate OCn and packet-based services*, and extend Phase II relief to areas where the existing competitive showing requirements do not fully detect the extent of competition entry." *Id.* ¶ 63 (emphasis added).

[87] *Small Refiner Lead Phase-Down Task Force*, 705 F.2d at 549.

[88] *Wilson & Co.*, 335 F.2d at 795.

as somehow excluding the largest market participants. Application of new rules governing packet-based special access services to the Forbearance ILECs is therefore a "logical outgrowth" of the *Data Request Order and FNPRM*.

Third, even if the Commission had failed to provide legally adequate notice under the APA, the Forbearance ILECs would have no basis for challenging the rules because the absence of adequate formal notice would be harmless error. Under the harmless error doctrine, an agency's failure to provide adequate notice is only unlawful where the complaining party can show that it was prejudiced by the absence of formal notice.[89] The Forbearance ILECs have had ample opportunity to comment on the potential regulation of their packet-based special access service offerings, including most recently in the comment period established by the *Public Notice*. Moreover, the Forbearance ILECs have taken full advantage of these opportunities, most recently by filing detailed, lengthy comments discussing whether forbearance should be reversed and whether new rules governing the rates, terms and conditions on which incumbent LECs offer packet-based services should apply to the Forbearance ILECs.[90] Nor have the Forbearance ILECs identified any prejudice that would result if the Commission were to proceed with adopting and applying new rules as proposed in the Petition. The reality is that any supplemental notice would be an empty formalism that would serve only to impose more costs on purchasers of the Forbearance ILECs' overpriced packet-based special access services and to threaten to further delay the completion of this critically important proceeding.

[89] *See* 5 U.S.C. § 706(2) ("[D]ue account shall be taken of the rule of prejudicial error."); *see also, e.g., Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001).

[90] *See generally* AT&T Comments; CenturyLink Comments; Verizon Comments.

3. The Commission Should Promptly Issue Any Necessary Supplemental Notice

Notwithstanding the arguments presented here, if the Commission were somehow to conclude that it must—out of an abundance of caution—provide interested parties with yet another opportunity to comment on reversing forbearance or applying new rules regarding packet-based special access services to the Forbearance ILECs, it should take this step as soon as possible. By doing so, the Commission will ensure that the special access proceeding is not needlessly delayed by the Forbearance ILECs' obvious slow-rolling tactics.

C. A Section 205 Rate Case Is Not Required To Reverse Forbearance And Adopt Regulations Governing Packet-Based Special Access Services.

Finally, contrary to AT&T's claims, the Commission would *not* "have to undertake a major [Section 205][91] rate case in order to re-impose price caps or other rate-related restrictions."[92] According to AT&T, the Commission cannot impose tariffing requirements on the Forbearance ILECs' packet-based special access services "until *after* it conducts a hearing" and prescribes just and reasonable rates pursuant to Section 205 of the Communications Act.[93] Citing to the FCC's brief in the 2004 special access mandamus case before the D.C. Circuit, AT&T further asserts that the "'record would have to support the conclusion that *every* . . . rate [and practice for] *every* [non-TDM-based service for] which [forbearance] has been granted violates Section 201.'"[94] But AT&T seems to have forgotten its own response to these arguments back in 2004, when it sought to compel the Commission to re-impose price caps on

[91] 47 U.S.C. § 205.

[92] AT&T Comments at 15.

[93] *Id.* at 16 (emphasis in original).

[94] *Id.* (alterations in original).

special access services in areas where incumbent LECs had been granted pricing flexibility. As AT&T explained in its brief in that case,

> Nor is there any § 205 "prescription" issue here. It is well-settled that the imposition of price caps is not a rate prescription, but only a "safe harbor" of rates that presumptively lawful. In any event, section 205's requirements for a hearing are routinely met through notice and comment rulemaking procedures, and the notice and comment that has already occurred [on] AT&T's Petition would fully satisfy the requirements of section 205.[95]

Indeed, the Commission has held that the application of price caps constitutes neither an actual rate prescription nor a *de facto* rate prescription.[96] In other words, applying price caps does not involve setting individual rates.[97] Rather, price caps simply reflect the Commission's "'tentative opinion' about the dividing line between reasonable and unreasonable rates for the limited purpose of exercising [its] suspension power"[98] under Section 204 of the Act.[99] For this reason, the Commission is not subject to the requirements of Section 205 when it applies price caps.[100] And therefore, contrary to AT&T's assertion, the Commission would not be subject to

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[95] Brief of Petitioners, *In Re AT&T Corp.*, No. 03-1397, at 42 (D.C. Cir. Aug. 20, 2004) ("*AT&T Brief in Support of Petition for Mandamus*").

[96] *See Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, ¶¶ 894-95 (1989) ("*AT&T Price Cap Order*").

[97] *American Telephone and Telegraph Company, Charges for Private Line Services Revisions of Tariff NCC Nos. 260, 264, and 266 Filed in Transmittal*, Memorandum Opinion and Order, 85 FCC 2d 549, ¶¶ 20-21 & n.20 (1981)) ("*AT&T Private Line Revisions Order*") ("The essential element of prescription is compulsion: compelling a carrier to adhere to a fixed rate which can be revised only with the prior consent of the Commission.") (emphasis in original). For the same reason, re-imposing price caps would not, as AT&T claims, constitute an unlawful "rollback" prescription of rates previously in effect. *See* AT&T Comments at 17.

[98] *AT&T Price Cap Order* ¶ 895 (quoting *Trans Alaska Pipeline Rate Cases*, 437 U.S. 631, 653 (1978)).

[99] 47 U.S.C. § 204.

these requirements if it were to grant the Petition and re-apply price caps to the Forbearance ILECs' packet-based special access services.

In all events, even if the Commission were to find that the application of price caps in this instance constitutes a rate prescription or a *de facto* rate prescription, the Commission would not be required to conduct a hearing.[101] As AT&T itself has recognized, courts have held that the hearing requirement in Section 205 is satisfied through notice-and-comment rulemaking procedures.[102] And as discussed in Part II.B above, the Commission has given the Forbearance ILECs repeated notice and multiple opportunities to comment on the proper regulatory framework for their packet-based special access services in the special access rulemaking proceeding.

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[100] *See AT&T Price Cap Order* ¶ 895 ("Because we are not prescribing rates, either explicitly or implicitly, we need not follow the procedural requirements of Section 205(a) of the Communications Act") (quoting *AT&T v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973)) (internal citation omitted); *see also* Federal Respondents' Uncited Response to the Joint Intercarrier Compensation Principal Brief of Petitioners, *In re: FCC 11-161*, No. 11-9900, at 39-40 (10th Cir. Mar. 6, 2013) (explaining that nothing in Section 205 limits the FCC's authority under Section 201(b) of the Act to cap rate levels through general notice-and-comment rulemaking proceedings).

[101] *See* AT&T Comments at 16 & n.40.

[102] *See AT&T Brief in Support of Petition for Mandamus* at 42; *see also International Settlement Rates*, Report and Order, 12 FCC Rcd. 19806 ¶¶ 300-01 (1997) (noting that the Supreme Court has held that "the notice and comment provisions of Section 553 of the APA satisfy a general hearing requirement such as that contained in Section 205") (citing *United States v. Florida E. Coast Ry.*, 410 U.S. 224 (1973)); *AT&T Co. v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978) (holding that notice and comment provides the "'full opportunity' to be heard" required under Section 205).

III. THE COMMISSION CAN AND SHOULD UTILIZE THE TRADITIONAL MARKET POWER FRAMEWORK TO ASSESS COMPETITION IN THE PROVISION OF PACKET-BASED SPECIAL ACCESS SERVICES.

A. The Traditional Market Power Framework Is Appropriate For Assessing Competition In Dynamic Markets For Broadband Services.

The incumbent LECs raise several arguments against utilizing a traditional market power analysis to evaluate competition in dynamic markets for broadband services such as packet-based special access services. None of these arguments have merit.

First, CenturyLink and Verizon argue that the Commission cannot use a market power analysis here because market share information can understate competition in "changing" broadband markets.[103] But the Commission already rejected the same argument in the *Pricing Flexibility Suspension Order*.[104] There, the Commission held that a "market analysis" based on the *DOJ-FTC Horizontal Merger Guidelines* (again, an analysis commonly known as the traditional market power framework) is precisely the right approach to analyzing competition in dynamic markets.[105] This is because the "market analysis" includes a "forward-looking" and "multi-faceted assessment of competition that considers a variety of factors" (*e.g.*, potential competition) in addition to consideration of market share.[106] Additionally, "this type of fact-

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[103] *See* CenturyLink Comments at 20; *see also* Verizon Comments at 26.

[104] *See Pricing Flexibility Suspension Order* ¶ 92 ("AT&T and Verizon both assert that the Commission should not rely on market share as the basis for concluding that a given market lacks competition, because market share is a static measure that can understate the impact of competitive alternatives in dynamic markets.").

[105] *See Pricing Flexibility Suspension Order* ¶¶ 87-101 (describing the "market analysis" and its benefits); *see also* NJ Division of Rate Counsel Comments at 9 ("The Commission should reject ILECs' frequent attempts to confuse changes in *technology* with changes in *market structure*.") (emphasis in original); COMPTEL Comments at 8 ("Market power concerns do not disappear merely because a market is evolving . . . .").

[106] *See id.* ¶¶ 92, 101.

specific analysis is in line with current approaches to competition policy"[107] and will "provide analytical precision" in determining whether a given market is competitive.[108]

Moreover, while changing market conditions (*e.g.*, changes in technology) may cause existing market shares to understate or overstate competition, this does not mean that the Commission should ignore market share data entirely or refrain from conducting a market analysis altogether. Rather, consistent with the *Merger Guidelines*, the Commission should "consider reasonably predictable effects of recent or ongoing changes in market conditions when calculating and interpreting market share data."[109] Otherwise, under the incumbent LECs' logic, the *Merger Guidelines* could *never* be applied to markets that are characterized by change. Of course, this has not been established practice. In 2011, for example, the DOJ and the FCC Staff relied on the *Merger Guidelines* to analyze competition in the fast-changing market for mobile wireless voice and broadband services.[110]

Indeed, nothing precludes the Commission from conducting a forward-looking assessment of market shares in a dynamic market. As the Joint Commenters have explained previously in this rulemaking proceeding, the Commission should (1) focus on shares of the underlying facilities used to serve business customers and (2) examine the location and ownership of facilities that *can* be readily used to provide the relevant service even if such

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[107] *Id.* ¶ 92.

[108] *See id.* ¶¶ 91-92.

[109] *Merger Guidelines* § 5.2.

[110] *See generally Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, WT Dkt. No. 11-65 (rel. Nov. 29, 2011); *see also* Amended Complaint, *United States v. AT&T Inc., T-Mobile USA, Inc., and Deutsche Telekom AG*, Civil Action No. 11-01560 (D.D.C. Sept. 16, 2011).

facilities are not *currently* being used to provide that service.[111] For example, an incumbent LEC can provide Ethernet and other packet-mode services to essentially any commercial building and along any point-to-point transport route reached by its network. Thus, for purposes of the market share analysis here, an incumbent LEC should be treated as serving all locations served by its network. This approach to assessing market shares and market concentration will enable the Commission to assess the position of a firm with respect to a service, such as Ethernet service, that is being gradually deployed over pre-existing network facilities.

Second, relying on the *Phoenix Order*, the incumbent LECs imply that Section 706 of the 1996 Act somehow prevents the Commission from conducting a traditional market power analysis when broadband services and broadband deployment are implicated.[112] However, the FCC never held in the *Phoenix Order* that "the 'traditional market power framework' is not appropriate" in the broadband context.[113] Rather, the FCC merely stated that "a different analysis *may* apply when the Commission addresses advanced services, like broadband services."[114]

In addition, the FCC held in the *Pricing Flexibility Suspension Order*, released after the *Phoenix Order*, that a "market analysis" is appropriate to assess competition in the provision of special access circuits (including Ethernet circuits), which are "a particularly important input" for carriers "to provide affordable broadband service."[115] In fact, the Commission held that "a

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[111] *See* Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25 *et al.*, at 65-66 (filed Feb. 11, 2013).

[112] *See* AT&T Comments at 33; CenturyLink Comments at 22; Verizon Comments at 28.

[113] AT&T Comments at 33.

[114] *Phoenix Order* ¶ 39 (emphasis added).

[115] *Pricing Flexibility Suspension Order* ¶ 94 & n.293.

comprehensive market analysis" that considers factors such as market share, barriers to entry, and demand elasticity "*will foster broadband deployment*" by "ensur[ing] that appropriate regulatory relief is granted in those markets where competitive conditions justify it."[116]

Furthermore, it is important to observe that Section 706 provides that the Commission should only utilize forbearance as a means of promoting broadband deployment if doing so is "consistent with the public interest, convenience, and necessity."[117] Deregulation via forbearance is not the only, or even the primary, approach to encouraging broadband deployment set forth in Section 706. The FCC can also use "price cap regulation" or "other regulating methods" to advance the goals of that provision.[118] It is clear therefore that the Commission has broad discretion to choose the optimal means of promoting broadband deployment under Section 706, including by reversing forbearance and adopting pricing regulations governing packet-based special access services.[119]

B. AT&T's Suggested Approach To Assessing Competition In The Provision Of Packet-Based Special Access Services Has No Basis In Economics, Law, Or Policy.

AT&T alleges that the Petitioners have proposed a "jury-rigged," "contrived," and "biased" market power analysis that is "contrary to sound economics" and is inconsistent with

[116] *Id.* ¶¶ 93-95 (emphasis added).

[117] 47 U.S.C. § 1302(a).

[118] *Id.*

[119] While the incumbent LECs maintain that such regulations will discourage investment in broadband (*see* AT&T Comments at 19-20; CenturyLink Comments at 29; Verizon Comments at 6-7), the Joint Commenters have already addressed the incumbents' tired "regulation kills investment" refrain elsewhere. *See, e.g.*, Comments of Cbeyond, EarthLink, Integra, Level 3, and tw telecom, GN Dkt. No. 12-353, at 27-28 (filed Jan. 28, 2013) ("Cbeyond *et al*. Technology Transition Comments"); *see also* Reply Comments of Cbeyond, Inc., WC Dkt. No. 09-223, at 22-26 (filed Feb. 22, 2010). The Joint Commenters need not repeat those arguments here.

the *Phoenix Order*.[120] As discussed below, it is in fact AT&T that advocates a results-oriented approach to assessing competition that has no basis in economics, law, or policy.

1. Market Definition

AT&T makes a number of claims to support its argument that the Commission cannot define the relevant product and geographic markets for packet-based special access services using the so-called "hypothetical monopolist" or "SSNIP" test.[121] The FCC should reject each of these claims.

First, AT&T suggests that the hypothetical monopolist test has fallen out of favor with economists and antitrust authorities as a reliable way to define relevant product and geographic markets.[122] While that may be the case with one of the economists hired by AT&T, there is in fact a broad and longstanding consensus among antitrust enforcement agencies, courts and economists that the hypothetical monopolist test provides the proper framework for market definition. As Professors Areeda and Hovenkamp, authors of the leading antitrust law treatise, have explained, that test is based on "indisputable propositions" of antitrust economics.[123] Similarly, DOJ officials have noted that the hypothetical monopolist test "has been acknowledged as an important tool by the courts in the United States and enforcement agencies

[120] *See* AT&T Comments at 33-34.

[121] *See id.* at 34-39.

[122] *Id.* at 35-36.

[123] Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 536, at 285 (3d ed. 2007); *see also id.* at 287 ("[T]he economic and business expertness of the Antitrust Division and the Federal Trade Commission itself commands some deference.").

around the world."[124] The law student notes and journal articles from recent law school graduates cited by AT&T provide no reason to question this consensus.[125]

Second, although AT&T claims that the hypothetical monopolist test "cannot logically be used to define markets for the purposes of determining whether 'market power' exists,"[126] the DOJ and economists have reached the opposite conclusion. According to the DOJ, when assessing market power in cases regarding single-firm conduct, the hypothetical monopolist test "appropriately focuses the market-definition process on market-power considerations and thereby helps to avoid ad hoc conclusions regarding the boundaries of the market and the effects of the conduct."[127] Indeed, "there exists no clear and widely accepted alternative to the hypothetical monopolist methodology for defining relevant markets" in such cases.[128] As some commentators have stated, although "[t]here are important differences between merger and non-

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[124] DOJ White Paper, Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, at 17 (June 4, 2002), *available at* http://www.justice.gov/atr/hmerger/11256.pdf; *see also id.* at 7-14 (tracing the widespread adoption of the hypothetical monopolist test by courts and "enforcement officials throughout the English-speaking world").

[125] *See* AT&T Comments n.119 (citing Andrew C. Hruska, Note, *A Broad Market Approach to Antitrust Product Market Definition in Innovative Industries*, 102 YALE L.J. 305 (Oct. 1992) (proposing that the hypothetical monopolist test should be "replac[ed]" by a "broadest market" approach that would "inject a bias against enforcement"); *id.* (citing Rachel S. Tennis and Alexander Baier Schwab, *Business Model Innovation and Antitrust Law*, 29 YALE J. ON REG. 307 (2012) (arguing that the guidelines should be "revised to allow for a more holistic consideration")); *cf.* Areeda & Hovenkamp, *supra* note 123, ¶ 537, at 290 (explaining that the hypothetical monopolist test, and indeed "*any* such guide" for defining product markets, "can be fairly criticized, though not fatally.") (emphasis added).

[126] *See* AT&T Comments at 35.

[127] U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, at 27 (2008), *available at* www.justice.gov/atr/public/reports/236681.pdf.

[128] *Id.*

merger cases . . . the Merger Guidelines' test can bring much needed analytical rigor and consistency to the market definition process in all antitrust cases."[129]

It is therefore unsurprising that the FCC has found the hypothetical monopolist test to be "an appropriate analytical framework for defining relevant markets in order to assess market power."[130] When it reached this conclusion in the *LEC Classification Order*, the Commission considered and expressly rejected arguments that the hypothetical monopolist test is only applicable in the merger context.[131] Since then, the Commission has repeatedly employed the conceptual framework of the hypothetical monopolist test to define relevant markets for purposes of determining whether incumbent LECs possess market power. For example, the Commission did so in the *Section 272 Sunset Order*[132] and the *Phoenix Order*.[133] AT&T has provided no reason for the Commission to depart from this precedent.

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[129] Mark A. Glick *et al.*, *Importing the Merger Guidelines Market Test in Section 2 Cases: Potential Benefits and Limitations*, 42 ANTITRUST BULL. 121, 150 (1997).

[130] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area et al.*, Second Report and Order in CC Docket No. 96-149 and Third Report in CC Docket No. 96-61, 12 FCC Rcd. 15756, ¶ 25 (1997) ("*LEC Classification Order*").

[131] *See id.* ("We acknowledge that, in its comments, DOJ notes that the different objectives of regulation and antitrust enforcement may affect the application of the market definition in those contexts. We agree and realize that the markets defined in a particular antitrust suit may reach different results. DOJ does not argue, however, that the fundamental concepts and principles espoused in the 1992 Merger Guidelines apply only in the merger context.").

[132] *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd. 16440, n.68 (2007) (relying on the analytical framework of the hypothetical monopolist test to define the relevant product and geographic markets and rejecting incumbent LECs' calls to either "establish a working group to commission studies to determine the relevant service market" or eschew market analysis altogether).

[133] *See Phoenix Order* nn. 146 & 195; *see also id.* ¶¶ 46-65.

Third, AT&T suggests that if *any* customers view two products with "differing prices and/or quality" as interchangeable, then the products are "reasonable substitutes" and belong to the same product market.[134] This is simply not true. The well-established standard for defining product markets is whether, in response to a price increase in Product A, *enough* customers of A would switch to Product B such that the price increase would be unprofitable.[135] As the FCC has found, "'the key empirical test is *how much switching* between [Product A] and [Product B] is due to changes in the relative prices (*i.e.*, the cross-elasticity of demand).'"[136] The cases AT&T relies upon make this exact point.[137]

Finally, AT&T resorts to mischaracterizing the Petitioners' arguments regarding product market definition. The Petitioners have *never* argued that "products cannot be considered . . . in the same relevant market[] if they have differing prices and/or quality."[138] While it is true that differences in prices and/or quality are not necessarily dispositive of whether two products are

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[134] *See* AT&T Comments at 36-37.

[135] *See Merger Guidelines* § 4.1.1.

[136] *See Phoenix Order* n.167 (quoting Declaration of Michael D. Pelcovits at 10) (attached to Cavalier Telephone, LCC Opposition to Qwest Petition for Forbearance, WC Dkt. No. 09-135 (filed Sept. 21, 2009)).

[137] *See, e.g.*, *DSM Desotech, Inc. v. 3D Sys. Corp.*, 2013 WL 389003, *12 (N.D. Ill. 2013) ("[T]he question becomes whether *enough* consumers will respond to a price increase by switching to an alternative to make price increases unprofitable.") (emphasis added); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998) ("[I]f *enough* customers view other forms of prescription drug delivery methods as acceptable substitutes to the services provided by the Defendants, then the relevant market should include these alternative methods.") (emphasis added).

[138] AT&T Comments at 36. Indeed, AT&T constructed this strawman so that it could recite the line of cases holding that products need not be identical to be considered in the same relevant market. *See id.* at 36-37.

"reasonable substitutes,"[139] those differences are relevant when defining product markets because they influence the degree to which enough customers view the products as interchangeable.[140] For example, numerous purchasers of special access services have indicated that they do not view "best efforts" broadband Internet access services as substitutes for dedicated special access services because of key differences between the products. EarthLink, for instance, has explained that best efforts services do not offer the guaranteed speed, symmetrical bandwidth, or requisite levels of service quality and security to meet the needs of "the vast majority of businesses currently purchasing special access services."[141] Similarly, Sprint has explained that it is unable to use best efforts services for cell site backhaul connections because those services do not satisfy Sprint's demands for low latency, consistent capacity, service level guarantees, privacy and security.[142] AT&T's suggestion that the Commission should ignore these perspectives is baseless. The hypothetical monopolist test properly incorporates these and other factors that contribute to cross-elasticity of demand to determine

[139] *Id.*

[140] For this reason, the FCC has repeatedly taken price and quality information into account when defining the relevant product markets. *See* Petition at 32-33 & nn.105-107.

[141] Declaration of Kevin F. Brand on Behalf of EarthLink, Inc. ¶ 9 (attached as Appendix D to Comments of BT Americas, Inc. *et al.*, WC Dkt. No. 05-25 *et al.* (filed Feb. 11, 2013)); *see also* Declaration of James A. Anderson ¶ 10 (attached as Exhibit 1 to Comments of XO Communications, LLC, WC Dkt. No. 05-25 *et al.* (filed Feb. 11, 2013)) (explaining that because best efforts services are not sold with quality of service guarantees and do not appeal to XO's carrier and enterprise customers, XO views these services as "a completely different product" from special access services).

[142] *See* Declaration of Paul Schieber, ¶ 13 (attached as Attachment A to Comments of Sprint Nextel Corporation, WC Dkt. No 05-25 *et al.* (filed Feb. 11, 2013)); *see also id.* ¶¶ 14-16 (explaining why Sprint cannot rely on best efforts services in lieu of special access services as inputs for the wireline data services demanded by enterprise customers).

whether products are in fact "reasonable substitutes."[143] The various cases cited by AT&T for its "reasonable substitutes" strawman argument actually rely on the hypothetical monopolist test to define the relevant product markets.

2. Facilities-Based Competition

According to AT&T, limiting the Commission's market power analysis to facilities-based competitors (*i.e.*, entities that provide service using their own transmission facilities) would be "nonsense."[144] AT&T further alleges that the Petitioners' proposal to examine only facilities-based competition is "a thinly veiled attempt to manipulate market definitions and antitrust principles to exclude relevant competition from the analysis."[145] But the approach proposed by the Petitioners is exactly the one taken by the FCC in the *Phoenix Order* and a number of other orders.[146] In the *Phoenix Order*, for example, the Commission expressly held that "evidence of *facilities-based* competition is highly relevant to determining whether competition is sufficient to satisfy the Section 10 criteria."[147] Similarly, in the *4-MSA* and *6-MSA Orders*, the Commission examined network coverage by "other last-mile facilities-based providers."[148]

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[143] *See, e.g.*, *DSM Desotech*, 2013 WL at *12; *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 120 (D.D.C. 2004).

[144] AT&T Comments at 42.

[145] *Id.* at 34.

[146] *See* Petition nn.108, 124.

[147] *Phoenix Order* ¶ 82 (emphasis added); *see also id.* ¶¶ 87, 100.

[148] *See Petitions of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis, St. Paul, Phoenix and Seattle Metropolitan Statistical Areas,* Memorandum Opinion and Order, 23 FCC Rcd. 11729, ¶ 42 (2008) ("*4-MSA Order*"); *see also id.* ¶¶ 35-36; *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, Memorandum Opinion and Order, 22 FCC Rcd. 21293, ¶¶ 37, 41 (2007) ("*6-MSA Order*").

Moreover, AT&T's hyperbole contradicts its own statements elsewhere in the special access rulemaking docket. Specifically, in its PRA comments on the forthcoming mandatory special access data request, AT&T argues as follows:

> Under basic economic principles that have been established at the Commission for years and approved in court, the Commission can base the level of regulation of special access services on *the extent to which alternative providers have made sunk investment in network facilities capable of providing dedicated access services* to customers served by the incumbent.[149]

In other words, it makes perfect sense for the Commission to focus its analysis here on facilities-based competition.

3. Wholesale Market Competition

AT&T relies on the *Phoenix Order* to assert that "there is no need to define and regulate separate 'wholesale' markets where there is 'full, facilities-based competition for the relevant *retail* services.'"[150] AT&T's reliance is misplaced for two reasons. *First*, in the *Phoenix Order*, the FCC separately defined and assessed competition in the relevant wholesale markets because there was a lack of "full, facilities-based competition for the relevant retail services."[151] As discussed in Part IV below, the same is true here.

Second, while effective retail competition among vertically integrated firms may obviate the need for wholesale regulation, that is not true for retail competition that depends on the availability of upstream inputs from wholesale providers. This is precisely why the Commission held in the *Phoenix Order* that "the mere fact that a relevant retail market was effectively competitive would not, by itself, be sufficient to justify relief, particularly if that retail

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[149] Paperwork Reduction Act Comments of AT&T, WC Dkt. No. 05-25 *et al.*, at 10-11 (filed Apr. 15, 2013) ("AT&T PRA Comments") (emphasis added).

[150] AT&T Comments at 39 (emphasis in original).

[151] *Phoenix Order* ¶ 94.

competition may depend on the [wholesale] rules or regulations from which forbearance relief is being sought."[152]

4. Potential Competition

AT&T glibly asserts that potential entry is likely in any building near a competitive LEC's network.[153] Specifically, AT&T claims that the "Department of Justice has . . . found that special access competition from traditional CLECs constrains ILEC prices in any building that is sufficiently near, but not necessarily already connected to, their competitive sunk network facilities."[154] But the DOJ has never made such a finding. In its cases against SBC and AT&T and Verizon and MCI, for example, the DOJ expressly took into account "the revenue opportunities in a building and the distance from the building to the CLEC's existing facilities" to conclude that potential entry was unlikely in hundreds of commercial buildings.[155] In fact, as shown in the Petition, the record evidence in this proceeding demonstrates that potential entry is costly and difficult even where a commercial building is located near a competitive LECs' existing transport network.[156]

AT&T also claims that the revenue opportunities posed by all of the services for which it received forbearance justify competitive LECs' deployment of facilities to provide comparable

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[152] *Id.* n.282.

[153] *See* AT&T Comments at 44.

[154] *Id.* at 44 (emphasis added).

[155] *See* Declaration of W. Robert Majure, *United States v. SBC Communications, Inc. and AT&T Corp.*, No. 1:05CV02102; *United States v. Verizon Communications Inc. and MCI, Inc.*, 1:05CV02103, n.15 (filed Aug. 9, 2006); *see also id.* ¶ 14.

[156] *See* Petition n.162.

packet-based special access services to enterprise customers.[157] According to AT&T, this is because its forbearance petition applied only to high-capacity services.[158] But that is simply not true. For example, AT&T received forbearance for its 50 Mbps Ethernet services.[159] As explained in the Petition, it is often uneconomic for a competitive LEC to self-deploy loop facilities to provide a single 50 Mbps Ethernet connection to a business customer in a given commercial building.[160] Thus, despite AT&T's suggestions to the contrary, competitive LECs do not have a "'significant incentive . . . to build their own facilities'" to serve every business customer that purchases packet-based special access services.[161]

5. Incumbent LECs' Cost Advantages, Size, and Resources

AT&T suggests that, contrary to decades of Commission precedent, the FCC should not take into account incumbent LECs' cost advantages, size and resources in assessing whether incumbent LECs have market power in the provision of packet-based special access services.[162] AT&T goes as far as to dispute that it has *any* cost advantages or first-mover advantages in the self-deployment of local transmission facilities used to provide packet-based special access

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[157] *See* AT&T Comments at 44-45.

[158] *See id.* at 45 ("AT&T's forbearance application in fact was addressed to 'high-speed, high-volume services that enterprise customers . . . use[d] primarily to transmit large amounts of data among multiple locations.'") (internal citation omitted).

[159] *See* Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Dkt. No. 06-125, Appendix A (filed July 13, 2006).

[160] *See* Petition at 46-51 (explaining that competitors will only construct their own loop facilities if there is sufficient demand (*i.e.*, revenue) to justify the cost of construction to a particular building).

[161] *See* AT&T Comments at 45 (internal citation omitted).

[162] *See id.* at 45-46.

services.[163] Yet AT&T's own "Project VIP" deployment plan belies this claim. As part of its *incremental* wireline network investment under "Project VIP,"[164] AT&T will construct fiber to approximately 55,000 commercial buildings over the next two-and-a-half years.[165] That is, *AT&T will deploy fiber to more buildings in a single year (i.e., approximately 22,000 buildings) than virtually any other competitor has been able to deploy fiber to over the last twenty to thirty years*.[166] Such a rapid, large-scale deployment is clearly possible because of numerous incumbency advantages. For example, as analysts have explained, "the ILEC is often able to take advantage of its existing network infrastructure to reduce the costs of its broadband deployment, *e.g.*, by placing the new fiber cables along its existing telephone poles, or within its existing underground conduits."[167] In addition, "because of their large market share and significant financial resources, ILECs are typically able to deploy their overlay broadband

[163] *See id.* at 45-46 & n.169. AT&T contends that competitive LECs have a substantial cost advantage over incumbents because "unlike ILECs, CLECs are under no obligation to provide service in high cost areas." *Id.* at 46. AT&T fails to mention, however, that incumbent LECs receive billions of dollars in universal service subsidies to serve those areas—and competitive LECs help pay for those subsidies in the form of universal service contributions.

[164] As the Joint Commenters have previously explained, "Project VIP" represents little, if any, increase in overall annual wireline capital expenditures by AT&T. *See* Cbeyond *et al.* Technology Transition Comments at 29-30.

[165] *See* FD (Fair Disclosure) Wire, "AT&T Inc. at JPMorgan Global Technology, Media and Telecom Conference – Final," Transcript at 4 (May 15, 2013) (Statement of Randall Stephenson, Chairman and CEO, AT&T Inc.).

[166] *See* Telecom Ramblings, "Metro Fiber and On-Net Buildings List," *available at* http://www.telecomramblings.com/metro-fiber-provider-list/ (last visited May 18, 2013) (listing the number of on-net buildings for most of the competitive LECs in the U.S.).

[167] *See* QSI Consulting, Inc., Viability of Broadband Competition in Business Markets, at 22 (Jan. 21, 2010), (attached as Exhibit A to Comments of Covad Communications Company, WC Dkt. No. 09-223 (filed Jan. 22, 2010)).

networks on a market-by-market basis, *in advance of* actual customer demand."[168]

CenturyLink's comments also belie its claims that incumbent LECs lack any cost advantages in the self-deployment of fiber facilities.[169] As CenturyLink explains, it "sometimes uses the fiber facilities it builds to a wireless cell site to reduce the cost of upgrading its network plant in a nearby residential neighborhood, in order to justify the cost of enhancing the company's broadband services in that neighborhood."[170] In other words, CenturyLink benefits from economies of scale and scope in ways that its competitors—which do not have extensive plant already deployed in residential areas—cannot.

IV. INCUMBENT LECS ARE DOMINANT IN THE PROVISION OF PACKET-BASED SPECIAL ACCESS SERVICES.

A. The Record Evidence Demonstrates, And The Forthcoming Data Request Responses Will Confirm, That Incumbent LECs Retain Control Of The Bottleneck Facilities Needed To Provide Packet-Based Special Access Services.

Under longstanding Commission precedent, "'control of bottleneck facilities' . . . is treated 'as prima facie evidence of market power requiring detailed regulatory scrutiny.'"[171] Thus, as explained in the Petition, the key question in the Commission's market power analysis is who owns the underlying facilities used to provide packet-based special access services to business customers.[172] Even AT&T agrees with this position. As AT&T argues in its recent PRA comments in this proceeding, the Commission should adopt regulations governing special

[168] *Id.* (emphasis in original).

[169] *See* CenturyLink Comments at 39-41.

[170] *Id.* at 34.

[171] *See Phoenix Order* ¶ 5 (quoting *Competitive Carrier First Report and Order* ¶ 58).

[172] *See* Petition at 41-42; *see also id.* at 38-39.

access services based on the extent to which competitive providers have made sunk investment in the network facilities used to provide those services.[173]

The Petition clearly demonstrates that incumbent LECs retain control of the bottleneck facilities needed to deliver packet-based special access services. In particular, the available evidence from the DOJ, the Government Accountability Office ("GAO"), and the FCC indicates that competitors have deployed their own fiber facilities to only a small percentage of commercial buildings across the United States.[174] And while AT&T and Verizon complain that the DOJ's and GAO's findings are outdated,[175] the Commission has expressly recognized that the economic barriers to the construction of last-mile facilities it identified a decade ago persist today.[176] Therefore, there is no reason to question the continued relevance of the DOJ's or the GAO's findings.

AT&T and Verizon also ignore the analysis of the first voluntary data request responses appended to the Petition. That analysis—based on data submitted to the FCC in 2011—shows that incumbent LECs retain an extremely high share of the last-mile connections needed to provide packet-based and TDM-based special access services.[177] CenturyLink objects to this finding on the basis that "less than 10 percent of COMPTEL's members" responded to the first

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[173] *See* AT&T PRA Comments at 10-11.

[174] *See* Petition at 42-44.

[175] *See* AT&T Comments at 25; Verizon Comments at 23-24.

[176] *See Phoenix Order* ¶ 84 ("[T]he Commission, in the *Triennial Review Order*, found that competitive carriers face extensive economic barriers to the construction of last-mile facilities. . . . We see nothing in the record to indicate that, in the years since the passage of the 1996 Act, these barriers have been lowered for competitive LECs that do not already have an extensive local network used to provide other services today."); *see also id.* ¶ 90 (making similar finding).

[177] *See* Petition, Attachment 2, Declaration of Susan M. Gately ¶ 4.

voluntary data request.[178] As COMPTEL explained to the D.C. Circuit, however, many COMPTEL members with self-deployed facilities (including tw telecom and TelePacific) responded to the request.[179] Numerous competitors that are not COMPTEL members (*e.g.*, BT, Comcast, Cox, Integra, Level 3, and XO) also responded.[180] Moreover, many of COMPTEL's members have no (or few) self-deployed loop facilities and thus had little, if any, of the information requested by the FCC.[181] Thus, it is highly unlikely that responses from those members would alter the results of the analysis supplied by the Petitioners. In all events, the facilities information submitted in response to the forthcoming mandatory data request will confirm that incumbents have enduring control over the last-mile facilities used to provide packet-based special access services.

B. The Pricing Information Submitted In Response To The Forthcoming Data Request Will Confirm That Incumbent LECs Have Been Exercising Their Market Power In The Provision Of Packet-Based Special Access Services.

As explained in the Petition, incumbent LECs' prices for packet-based special access services are well in excess of competitive levels.[182] This fact is confirmed by a recent analysis submitted by COMPTEL, which "compared the [finished] Ethernet prices of AT&T and

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[178] CenturyLink Comments at 39.

[179] *See* Reply of Petitioners in Support of Petition for Writ of Mandamus, *In re* COMPTEL, *et al.*, No. 11-1262, at 6 (D.C. Cir. filed Oct. 19, 2011) ("Mandamus Reply Brief").

[180] *See, e.g.*, Response of BT Americas Inc., WC Dkt. No. 05-25 *et al.* (filed Jan. 27, 2011); Response of Comcast Business Communications, LLC, WC Dkt. No. 05-25 *et al.* (filed Jan. 27, 2011); Response of Cox Communications, Inc., WC Dkt. No. 05-25 *et al.* (filed Jan. 27, 2011); Response of Integra Telecom, Inc., WC Dkt. No. 05-25 *et al.* (filed Jan. 27, 2011); Response of Level 3 Communications, LLC, WC Dkt. No. 05-25 *et al.* (filed Feb. 14, 2011); Response of XO Communications LLC, WC Dkt. No. 05-25 *et al.* (filed Jan. 27, 2011).

[181] *See* Mandamus Reply Brief at 6.

[182] *See* Petition at 57.

CenturyLink to a comparable service constructed using the wholesale Ethernet offering of rural ILECs in NECA [Tariff No. 5]."[183] COMPTEL found that "the BOC prices are often greater by an order of magnitude."[184] For instance, AT&T's Ethernet channel termination prices are between six times higher (for 2 Mbps service) and 11 times higher (for 1 Gbps service) than a comparable service built using the NECA Tariff No. 5 wholesale components, even with a three-year contract.[185] Similarly, CenturyLink's Ethernet channel termination prices on a three-year term are between two times higher (for 2 Mbps service) and 11 times higher (for 1 Gbps service) than a comparable service.[186]

The incumbent LECs still complain that competitors have not provided enough current pricing information to justify reversing forbearance.[187] Much of the relevant pricing data is, however, in the hands of the incumbents, and they have refused to provide it. For example, AT&T faults the Petitioners for failing to submit "AT&T's wholesale Ethernet rates" and "AT&T's retail Ethernet rates" into the record,[188] but there is no better source for such information than AT&T itself. It is also worth pointing out that while AT&T criticizes the Petitioners for failing to provide current pricing information, AT&T is actively trying to prevent both competitive LECs and the Commission from obtaining such information by seeking the

[183] *See* COMPTEL Comments at 10.

[184] *Id.*

[185] *See id.* at 10-11.

[186] *See id.* at 11.

[187] *See* AT&T Comments at 47; CenturyLink Comments at 25.

[188] AT&T Comments at 47.

elimination of all pricing-related questions from the proposed mandatory special access data request.[189]

Also, to the extent that competitive LECs have information on the prices, terms, and conditions on which incumbent LECs offer Ethernet and other unregulated packet-based special access services, non-disclosure agreements almost always prohibit them from sharing it with the Commission.[190] For example, to the extent that incumbent LECs offer packet-based special access services at prices that differ from their guidebook prices, non-disclosure agreements prevent competitive LECs from disclosing those prices or associated terms and conditions to the FCC.

In all events, assuming that pricing information is requested in the mandatory special access data collection that is approved by the Office of Management and Budget,[191] the information the FCC receives in response to that request will confirm that incumbent LECs have been exercising their market power by, among other things, charging supracompetitive prices for Ethernet services at the retail and wholesale levels.

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[189] *See* AT&T PRA Comments at 13-24.

[190] To the extent that non-disclosure agreements with the Joint Commenters are preventing the incumbent LECs from submitting (as highly confidential information in WC Dkt. No. 05-25) information on the prices, terms, and conditions on which they offer Ethernet and other packet-based special access services, the Joint Commenters waive the relevant provisions of those non-disclosure agreements.

[191] For years, AT&T has repeatedly called for the FCC to issue a mandatory information collection in this proceeding. *See, e.g.*, Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed Mar. 28, 2012); Letter from Frank S. Simone, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment, at 2 (filed Aug. 4, 2010) (urging the FCC to gather information on, among other things, "[a]ctual transaction prices" as part of a mandatory special access data request). As noted above, however, AT&T now seeks to undermine the Commission's efforts to move forward with special access pricing reform by urging the elimination of all pricing-related questions from the proposed data request.

C. The "Evidence" Of Effective Competition Offered By The Incumbent LECs Is Flawed.

The incumbent LECs rely on various sources of "evidence" to support their claims that competition for packet-based special access services is "robust" and "thriving."[192] As discussed below, these sources of purported competition are uniformly unreliable.

1. Vertical Systems Group Rankings

The incumbent LECs assert that the market for Ethernet services is effectively competitive because competitive LECs are ranked highly on Vertical Systems Group's list of top Ethernet service providers in the U.S. in terms of retail business Ethernet ports. [193] Those rankings are irrelevant to a market power analysis for a number of reasons.

First, under the traditional market power framework (or any other reasonable standard), the Commission must assess the level of competition in the relevant product market. The Vertical Systems Group rankings do not differentiate between the level of competition in the provision of Ethernet services at different capacity levels (*e.g.*, between 10 Mbps services and 1 Gbps services). This omission makes it impossible for the FCC to rely on the Vertical Systems Group data as a basis for determining the extent to which incumbent LECs face competition in a particular product market.

Second, under the traditional market power framework (or, again, any other reasonable standard), the Commission must assess the level of competition in the relevant geographic market. Vertical Systems Group simply ranks providers based on the total number of ports they sell *nationwide*. As such, these rankings have no bearing on the level of competition in the

[192] *See* AT&T Comments at 7; Verizon Comments at 6.

[193] *See* AT&T Comments at 6, 27-30; Verizon Comments at 9-11 & App. A.

provision of Ethernet services in a particular geographic market (*e.g.*, at an individual customer location or in a representative wire center).[194]

Third, the rankings do not differentiate between Ethernet ports associated with services that competitive LECs provide over their own last-mile facilities and Ethernet ports associated with services that competitive LECs provide over last-mile facilities leased from incumbent LECs. It would defy logic, and AT&T's own advocacy in its PRA comments,[195] for the Commission to relieve an incumbent LEC of dominant carrier regulation of its packet-mode special access inputs based on competition from service providers that rely on those very same inputs to deliver packet-based special access services to their own end-user customers.[196]

2. Competition From Cable and Fixed Wireless Providers

The incumbent LECs overstate the amount of competition they face from cable companies and fixed wireless service providers. To begin with, the incumbents' reliance on cable companies' "business services" revenues, "commercial services" revenues, and "business customer relationships" as evidence of Ethernet competition is misleading.[197] A large percentage of those revenues and relationships are attributable to services that are not in the same product market as packet-based special access services. For example, the overwhelming majority of Comcast's business services revenues are generated from the sale of voice, video, and "best

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[194] *See* Petition at 35-38 (describing how the Commission could undertake a granular market power analysis in representative wire centers).

[195] *See supra* note 189 and accompanying text.

[196] Because the Vertical Systems Group rankings of the incumbent LECs do not take into account their wholesale Ethernet port sales, the rankings significantly understate the share of ports sold by incumbent LECs' nationwide. For the same reason, the Commission cannot rely on this data to properly conduct separate analyses of the wholesale and retail markets for Ethernet services.

[197] *See* Verizon Comments at 11, 13; CenturyLink Comments at 23-27.

efforts" broadband Internet access services to businesses with 20 or fewer employees.[198] Similarly, Time Warner Cable's and Cox's business services revenues include those generated from the sale of business video services, web hosting services, and cloud-based services.[199] Therefore, these statistics have no bearing on the level of competition in the market for packet-based special access services.

In addition, it is well known that fixed wireless services are subject to a number of limitations, such as line-of-sight restrictions and limited range, that restrict their potential for widespread adoption. In 2009, the National Regulatory Research Institute found that, in part because of these limitations, fixed wireless services had only a "fringe effect" on the special access marketplace.[200] Neither AT&T nor Verizon offers any reason to believe that fixed wireless has emerged as a more significant source of competition since that time. For instance, while Verizon asserts that it faces competition from Believe Wireless Broadband, that company had only four full-time employees as of December 2012.[201] Similarly, Verizon claims that it is

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[198] *See* Transcript, Comcast Presentation at Wells Fargo Securities 2012 Technology, Media & Telecom Conference, at 8-9 (Nov. 7, 2012) (Statement of Michael J. Angelakis, Chief Financial Officer & Vice Chairman, Comcast Corp.) (explaining that the sale of Metro Ethernet services and primary rate interface trunks accounts for only 15 percent of Comcast's business services revenues).

[199] *See* Time Warner Cable, Annual Report (Form 10-K) at 4 (Feb. 15, 2013) ("TWC offers data, video and voice services, managed and outsourced IT solutions and cloud services to businesses."); Cox Web Hosting Fact Sheet, *available at* ww2.cox.com/wcm/en/business/datasheet/ds-web-host.pdf; Cox Business Video Fact Sheet, *available at* ww2.cox.com/wcm/en/business/datasheet/ds-video-basic.pdf.

[200] Peter Bluhm and Dr. Robert Loube, National Regulatory Research Institute, *Competitive Issues in Special Access Markets*, Revised Edition, at 52 (Jan. 21, 2009), *available at* http://www.nrriknowledgecommunities.org/documents/317330/d942abc1-b86c-40ad-b7d0-ca1ae1ef6d41.

[201] *See* Barbara Pash, "Baltimore County Wireless Firm Moves into DC Market," *Bmore Media* (Dec. 11, 2012) (stating that "[t]he company has four full-time employees"), *available at*

subject to competition from Airtap, but that company operates almost entirely over the waters of the Gulf of Mexico.[202]

3. Wholesale Competition

None of the incumbent LECs' arguments regarding wholesale competition in the provision of packet-based special access services have merit either. *First*, AT&T asserts that "[n]umerous facilities-based providers offer wholesale broadband access services (including Ethernet services)."[203] The Commission should reject this claim because AT&T fails to provide any support for it.[204]

Second, the incumbent LECs assert that, at the wholesale level, "CLECs enjoy multiple alternatives to ILEC [packet-based special access services]," including the ability to rely on "TDM-based DS1 and DS3 services" or unbundled copper loops.[205] This argument is flawed for several reasons. To begin with, it is well-established that where downstream retail competition relies upon wholesale inputs from incumbent LECs, the incumbents have the incentive and ability to raise retail rivals' costs by denying, delaying and degrading those inputs.[206]

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http://www.bmoremedia.com/innovationnews/baltimoreinternet121112.aspx (last visited May 17, 2013).

[202] Airtap, About Airtap, *available at* http://airtap.com/about.htm ("AirTap operates the Gulf of Mexico's largest high speed, multi-point broadband network.") (last visited May 17, 2013); *see also* Airtap, Airtap's Network – Built for Speed, *available at* http://airtap.com/the-network.htm (last visited May 17, 2013).

[203] AT&T Comments at 41.

[204] *See id.*

[205] *See* CenturyLink Comments at 26-27; *see also* AT&T Comments at 41.

[206] *See e.g., Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 176 (2000) ("Incumbent LECs in

In addition, as the Joint Commenters have explained, TDM-based DS1 and DS3 inputs are not viable substitutes for wholesale access to incumbent LEC Ethernet services. In particular, reliance on TDM-based facilities results in higher costs, less flexibility to adjust capacity to meet the customer's needs, and increased potential points for failure as compared to reliance on wholesale finished Ethernet loops.[207] These limitations eliminate many of the inherent cost advantages of Ethernet technology.[208]

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general have both the incentive and ability to discriminate against competitors in incumbent LECs' retail markets. . . . Incumbent LECs' ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.").

[207] *See* Letter from Thomas Jones and Jonathan Lechter, Counsel for tw telecom, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 09-47, 09-51 & 09-137, at 9-10 (filed Dec. 22, 2009) ("*tw telecom Dec. 22, 2009 Letter*"); *see also* Letter from Joshua M. Bobeck, Counsel for Alpheus Communications, L.P., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125, at 3-5 (filed Oct. 9, 2007); Letter from Thomas Jones, Counsel for Time Warner Telecom, Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125, at 3-4 (filed Aug. 24, 2007); Letter from Aryeh Friedman, BT Americas Inc., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 06-125 & 06-147, at 1-2 (filed Oct. 5, 2007); Letter from Brad E. Mutschelknaus *et al.*. Counsel for NuVox Communications *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 04-440 *et al.*, at 7 (filed Sept. 19, 2007); Letter from Laura H. Carter. Vice President, Government Affairs, Federal Regulatory, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 05-25, 06-109, 06-125, & 06-147, at 7-8 (filed Aug. 30, 2007); Opposition of Time Warner Telecom, Inc. *et al.*, WC Dkt. Nos., 06-125 & 06-147, at 16-20 (filed Aug. 17, 2006).

[208] *See* Abdul Kasim, DELIVERING CARRIER ETHERNET: EXTENDING THE ETHERNET BEYOND THE LAN, at 95 (2008) ("One big advantage of carrier Ethernet services is the economics for both the service providers and enterprise end users. However, as these services are currently being delivered over numerous underlying technologies . . . the economics may be less attractive (as opposed to delivering native Ethernet)."); *id.* at 214-15 ("In particular, leased line services run at slower TI or OC3 speeds and require costly intermediate protocol [translations] . . . It is well known that these multilayered set ups suffer from huge bandwidth inefficiency and are very costly from an operational perspective. More importantly, they have failed to keep pace with today's gigabit-level Ethernet port speeds."); Lee L. Selwyn, Economics & Technology, Inc., *The Non-Duplicability of Wholesale Ethernet Services: Promoting Competition in the Face of the Incumbents; Dominance over Last Mile Facilities*, at 19 (Mar. 2009), *available at* http://www.ic.gc.ca/eic/site/smt-gst.nsf/vwapj/crtc-2008-117-MTS-Appendix3.pdf ("[I]f the [ILEC] is only required to offer its TDM-based services . . . the competitor seeking to provide Ethernet services over this facility is confronted with the costly and inefficient task of re-provisioning the service -- cobbling the bandwidth together from 'slices' that are mid-sized for the required use and purchasing additional, costly electronic equipment.").

Unbundled conditioned copper loops also have several limitations as an input for Ethernet services. For instance, copper is unavailable in many suburban areas because incumbent LECs have replaced it with fiber or failed to maintain it.[209] And even where copper is available, it may be unsuitable for the provision of Ethernet (*e.g.*, because the copper pair between the central office and the end-user location is too long).[210]

Furthermore, the incumbent LECs' argument that competitive LECs can rely on TDM-based inputs to provide packet-based special access services is entirely disingenuous. This is because the incumbents are aggressively seeking the establishment of "a date certain for an official TDM-services sunset" and the elimination of all "requirements that could require [them] to maintain TDM networks and services."[211]

Third, the fact that some of the Petitioners have entered into contracts with Verizon or other incumbent LECs for packet-based special access services is not evidence of "thriving" wholesale competition.[212] In light of the barriers to competitive deployment of fiber and incumbent LECs' enduring control over the last-mile connections needed to serve the vast majority of business customer locations in the U.S., it is not surprising that competitive LECs

[209] *See, e.g.*, Cbeyond, Inc. Petition for Expedited Rulemaking to Require Unbundling of Hybrid, FTTH, and FTTC Loops Pursuant to 47 U.S.C. § 251(c)(3) of the Act, WC Dkt. No. 09-223, at 18-19 (filed Nov. 16, 2009).

[210] *See, e.g., id.*

[211] *See* Letter from Robert W. Quinn, Jr., Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 *et al.*, Attachment ¶¶ 1, 6 (filed Aug. 30, 2012).

[212] *See* Verizon Comments at 6-7.

have purchased the wholesale Ethernet services needed to reach their off-net business customer locations from the incumbent LECs.[213]

V. CONCLUSION

For the foregoing reasons, the Commission should grant the Petition.

Respectfully submitted,

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[213] *See, e.g.*, Level 3 Comments at 3 ("For all too many locations and routes, there simply is no alternative to the ILECs for high speed special access services, regardless of the technology deployed.").